

AILA NorCal / San Francisco EOIR Liaison
Questions and Answers for meeting on July 16, 2009

1. What is the status of cases that were previously assigned to Judge Bernstein?

EOIR is presently deciding whether to replace Judge Bernstein's vacated position in San Francisco. We expect a decision once the fiscal year 2010 budget is released. If his position is replaced, the cases on his docket will transfer to the immigration judge that replaces him. If his position is not replaced, the cases will be equally distributed among the remaining San Francisco immigration judges. Judge Bernstein's current docket is 233 cases.

2. A member would like to know the purpose of the overhead microphones in the Immigration Court galleries and also whether they are on at all times when a case is on the record. There is no notice in the Court about the microphones. The member is concerned that the microphones could pick up conversations that were intended to be confidential. Respondents that are not represented and even some attorneys may not realize that their conversations are being recorded. This raises the possibility of compromising asylum confidentiality or other privileged conversations.

The microphones hanging from the ceiling in the gallery section of the courtroom should be presumed to be "on" whenever the court is on the record. The purpose of the microphones is to capture witness testimony from the gallery when there is not space available or it is more time efficient than having someone step forward and sit in the witness box. They are particularly beneficial when a case has many family members, during master calendars to have family members identify themselves, and during detained custody sessions when it is not practical for each respondent to be individually brought forward to the counsel table or witness box to speak. However, these microphones, like the table top microphones in the courtroom, are mono-directional and only capture voices spoken directly into them. In order for the gallery microphone to capture a voice, the person needs to be standing and speaking directly below the microphone. It will not capture voices of people sitting and speaking quietly in the gallery. Attorneys who are concerned privileged conversations might be recorded should ask the judge to turn off the gallery microphones or ask permission to conduct the conversation outside the courtroom.

3. What is the current, approximate calendaring time for each IJ between the final master hearing and the first individual calendar hearing? This question relates to normal cases where there is no clock. We understand that there may be exceptions when there is urgency in a particular case.

The scheduling time between the final master calendar and the first individual hearing for a non-fast track asylum case depends on the size of each immigration judge's docket. Some judges are setting cases eight months out while others are setting cases out 17 months. The longer wait times for individual hearings are due to several factors:

- *The court is receiving increasingly more cases in comparison to the last few fiscal years*
- *Increasing numbers of respondents are requesting expedited calendaring of fast track asylum cases, which causes non-priority cases to be bumped to later dates*
- *Due to the growing complexity of immigration cases, the judges are finding that it is necessary to hold multiple hearings to complete cases. As a result, the judges are beginning to hear fewer cases each day, which translates into dockets being set out farther.*

4. Please clarify the process for making a complaint about an IJ. What is the proper procedure?

For information on the complaint process, see the Immigration Court Practice Manual, Chapter 1.3(c) (Immigration Judge conduct and professionalism).

If a written complaint is filed, should it go to the ACIJ only or should a copy also be sent to the Office of the General Counsel in Falls Church?

Attorneys may file a complaint with ACIJ Griswold and/or with the ACIJ for Conduct and Professionalism, MaryBeth Keller, at OCIJ in Falls Church as they wish. However, we encourage attorneys to make such complaints in the first instance at the local level with ACIJ Griswold. Contact information for ACIJ Keller is available on the EOIR website. Complaints should not be sent to the Office of General counsel.

What procedure does the ACIJ follow after receiving a complaint?

The ACIJ investigates the complaint, which may involve, as appropriate, contacting the complainant, the judge and any witnesses, and reviewing the hearing record. The ACIJ consults with the ACIJ for Conduct and Professionalism regarding the appropriate course of action. Possible courses of action include informal resolution, disciplinary steps, or referral to appropriate components within DOJ.

Can the complainant find out the result of any action taken as a result of the complaint?

Because of the privacy protections of individual Immigration Judges, we are frequently prohibited from giving out information about how specific complaints were resolved. However, there are times when certain information can be communicated, and when we are able to do so, we do.

What steps are taken to ensure privacy of a complainant? The member is concerned that when a detailed affidavit of the respondent or attorney accompanies the complaint, the IJ is likely to recognize the complaining party.

Confidentiality can be maintained if requested by a complainant. However, to resolve certain complaints, it may be necessary to provide the judge with the information asserted so that the judge may respond, which would in turn potentially reveal the source of the complaint. In that instance, a complainant who has requested confidentiality will be consulted and advised that the complaint cannot be resolved without providing the information to the judge. In most circumstances, it is possible to maintain confidentiality if requested.

What steps are taken to ensure the IJ does not retaliate in the future?

Allegations of retaliation would be taken very seriously by OCIJ. Please report any such instances to ACIJ Griswold and/or ACIJ Keller.

5. What are the guidelines for requesting an IJ recuse himself/herself from a case? Is a motion to recuse handled differently than other motions filed with the Court?

A motion to recuse can be submitted like any other motion. Counsel should follow the provisions on motions in Chapters 5 of the Practice Manual. Motions to recuse are adjudicated by the judge on a case by case basis.

6. A great deal of effort was invested in the success of the vertical prosecution program, by ICE OCC, the bar, and by EOIR and the IJs. We would like to know the reasons why the court decided to withdraw from the program entirely, and for concluding the program in its current form was unsalvageable. Please advise if EOIR and OCC are discussing a revival of the program.

The court and DHS worked diligently over an 18 month period to design and implement a vertical prosecution program, following the parameters set by EOIR and DHS. Once implemented, the court found maintaining the system to be overly burdensome and time consuming. Although a procedure was set in place to handle the resetting of cases, the coordination efforts of new dates and times between the court, DHS and the private bar was causing delays of up to weeks to reset a case. Court staff was dedicating an inordinate amount of time resetting cases, and, as a result, the court saw a dramatic drop in productivity related to processing motions and general data entry. Ultimately, the court decided to not continue with the program. DHS is now considering a new system in which each immigration judge has a set group of assistant chief counsels that generally only appear before that judge.

7. Please advise if are there any plans in the works for electronic filing of documents with BIA or the immigration courts anywhere in the country.

This question is best addressed to the national AILA-EOIR liaison committee. A similar question was raised in the October 21, 2008, AILA-EOIR liaison. Minutes of the national AILA-EOIR liaison meetings are available on EOIR's website.

Asylum clock

8. What is the proper procedure for addressing problems with the asylum clock? At the last liaison meeting, the Court stated that members should try to "resolve the issue locally with either

the Immigration Judge or the Court Administrator and thereafter with the Assistant Chief Immigration Judge." Can you please provide clarification about the best way to raise this issue with the Court? Does resolution of this issue require the filing of a motion, or can the attorney contact the IJ's clerk or the Court Administrator directly? If so, is there a preference as to who is contacted first, the IJ or the Court Administrator? If the member feels that neither the IJ nor the Court Administrator have provided an appropriate response, what is the best way to raise the issue with the Assistant Chief Immigration Judge?

If a party feels that there is a problem with the asylum clock in an individual case and that case is pending before an Immigration Judge, the first step is to try to resolve the issue locally. Attorneys should contact Maria Jauregui, Court Administrator, for these issues. This can be in the form of a phone call (415-705-4415 ext 237), email (maria.jauregui@usdoj.gov) or sending her a letter regarding the clock issue.

If the concern arises during a hearing, it should be addressed to the Immigration Judge.

If necessary, the question may also be raised with Assistant Chief Immigration Judge Griswold.

For cases that are pending before the BIA, asylum clock questions should be directed to the attention of the Office of the General Counsel (OGC), which works with OCIJ to respond appropriately to the clock inquiry.

9. Even in instances where the IJ has adjourned a case with a code that does not stop the clock, members have reported problems with Service Centers rejecting I-765 applications for employment authorization. The Service Center shows that the asylum application has been pending for a different number of days than reported on the EOIR 1-800 number or by the IJ's clerk. When the member inquired with the IJ's clerk about the problem, he was told that the problem might be the result of the clerk not being in the correct screen when entering information or because of a "computer" problem. Correcting the problem requires additional work by the Judges, the clerks, and counsel. Can the Court look into what is causing this error?

If this issue continues to arise, please contact Court Administrator Maria Jauregui with the A numbers of the cases in which it is a problem.

10. For expedited asylum cases, at least one IJ takes the position that the clock must be stopped if the attorney intends to supplement the record at the 15-day deadline for the individual calendar hearing. For example, when the attorney intends to submit additional documentation that was not available to be submitted to the asylum office and is not available at the master calendar hearing, or updated country conditions. The Practice Manual specifically provides for filings to be submitted 15 days prior to an individual calendar hearing (Chapter 3.1(b)(ii)). Stopping the clock for filings, when the attorney is complying with the filing procedures in the Practice Manual, is both prejudicial to the respondent and, the member believes, an abuse of discretion. What is the authority for stopping the clock when filings are made within the 15 day deadline and in compliance with the Practice Manual?

This issue depends on the interpretation of the applicable regulations. See, e.g., 8 CFR 1208.3(a) and (c) as well as 8 CFR 1208.7. As such, this question raises issues which are decided by the judge based on his or her interpretation of those regulations.

Practice manual

11. According to the Immigration Court Practice Manual 2.3(d), "[o]nce an attorney has made an appearance, that attorney has an obligation to continue representation until such time as the alien terminates representation or a motion to withdraw or substitute as counsel has been granted by the Immigration Court" (emphasis added). Does this mean when the alien terminates representation, the counsel does not need to file a motion to withdraw and can just notify the court that the alien terminated representation? What can an attorney do when a judge denies a motion to withdraw despite the fact that the alien terminated representation?

The Practice Manual addresses this question at Chapter 2.3(i)(iii) Release of counsel:

When an alien elects to terminate representation by counsel, the counsel remains the attorney of record until the Immigration Judge has granted either a motion for substitution of counsel or a motion to withdraw, as appropriate.

If the judge denies a motion to withdraw, counsel should pursue the usual avenues of review before the judge and the Board.